

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. Z-1252 880
LICENSE NO. 07320
Issued to: Fred E. ARNOLD

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2123

Fred E. ARNOLD

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 6 May 1977, an Administrative Law Judge of the United States Coast Guard at Seattle, Washington suspended Appellant's license for four months on ten months' probation upon finding him guilty of negligence. The specification found proved alleges that while serving as operator on board the United States towing vessel TECUMSEH, O.N. 258 916 under authority of the license above captioned, on or about 5 August 1976, Appellant allowed the towing bridle between his vessel and the barge SKIPANON to go slack and drag on the bottom of the Coos River in a submarine cable area causing the submarine cable to be broken.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification found proved.

The Investigating Officer introduced in evidence the sworn testimony of Mssrs. Don Dillon, Dennis Reynolds, Homer Blakeney, Steven Johnson, Orville Fuller, and Peter Busick, and the following documents: Affidavit of Service of the Charge; U.S. Army Engineer District, Portland; "Coos Bay, Oregon 35' Channel Modification General Plan"; U.S. Army Engineer District, Portland; "Coos Bay, Oregon 35' Channel Modification Coos Bay and Empire Ranges"; Statement of Steven Phillip Johnson of 28 January 1977.

In defense, Appellant offered in evidence a list of voyages across the relevant area by tugs and barges belonging to Sause Bros. Towing Co. for the months of July 1976 and August 1976; a list of these voyages under control of Appellant. He also offered the testimony of Orville Fuller, John G. Davis; Richard Godfrey; and his own testimony.

At the end of the hearing, the Judge rendered a written decision in which he concluded that the charge and one of the two alleged specifications had been proved. He then served a written

order on Appellant suspending all documents, issued to Appellant, for a period of four months on ten months' probation.

The entire decision and order was served on May 9, 1977. Appeal was timely filed on 3 June 1977.

FINDINGS OF FACT

On 5 August 1976, Appellant was serving as Operator on board the United States towboat TECUMSEH, O.N. 258916 and acting under authority of his license while the vessel was on Coos River, Oregon. The TECUMSEH was towing astern the barge SKIPANON upriver.

The bridle of Appellant's tow was made up of two chains approximately forty-five feet long. One end of each chain was connected to the starboard and port bow of the barge, respectively. The other ends came together and were connected to the tug's towing line approximately forty feet from the barge forming a triangle. When slack, the bridle would be submerged and, except in water deeper than the "height" of the "triangle," would drag the river bottom.

Appellant had made five additional crossings of the cable area with tows similar to the TECHUMSEH - SKIPANON during the period of July and August 1976 without dragging the towing bridle over the cable area. Other tugs and tows of the same company for which Appellant worked had made sixty-one crossings of the cable areas without a similar incident during the same period. Appellant knew where the submarine cable area was and that the submarine cable was vulnerable to being snapped if something were dragged over it. He had been advised by his superior to be careful in the area of the cable crossing.

On 5 August 1976, there were no unusual or particularly adverse weather, tidal or current conditions on the Coos River in the vicinity of the submarine cable. On that date while transiting the submarine cable area, Appellant allowed his towing bridle to go slack. The bridle dragged the bottom, and snapped a submarine cable.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is urged that the Administrative Law Judge was in error by finding Appellant negligent and imposing such a serious penalty.

APPEARANCE: Richard W. Davis, Esq., of Lindsay, Nahstall, Hart, Neil and Weigler, Portland, Oregon.

OPINION

Appellant characterizes the instant proceedings as quasicriminal involving a penalty, and urges error in the Judges's utilization of the well-recognized presumption that a moving vessel that strikes a stationary object is presumed to be negligent.

The thrust of Appellant's argument, with respect to his first contention, seems to be that this presumption is invalidly applied to these proceedings. This argument is without merit for a number of reasons.

First, these proceedings are not criminal or even quasicriminal. Appeal Decision 1755 (Ryan). The Commandant has often held that such a presumption applies to these proceedings. See o.g. Appeal Decisions 1968 (Johnson) and 1200 (Richards). Thus, the Administrative Law Judge was justified in utilizing the presumption. Second, it is clear from the Judge's decision that he did not rely solely on the presumption in reaching his conclusions. (D&O 15). The Judge's findings and conclusions are supported in the record.

Appellant's discussion of the first specification alleging negligence which was dismissed by the Administrative Law Judge is understood to be relevant to his interpretation of the correct standard of negligence in these proceedings. Appellant urges that negligence should be limited to "wanton conduct, carelessness, indifference of at least inattention to duties." He cites the discussion of the Administrative Law Judge from the bench with respect to the dismissed specification. The Judge's statements regarding negligence are interpreted to conform to the standards set out in 46 C.F.R. 5.05-20(a) (2).

The record supports the findings of fact herein that Appellant knowing he was in an exposed submarine cable area allowed his towing bridle to drag on the river bottom severing that cable. The evidence also supports the findings that it was not only possible but a common occurrence for tugs to transit this area without allowing their towing bridles to drag the bottom. Indeed, Appellant's own evidence showed that he had made numerous successful transits under similar not unfavorable conditions. Thus, the record supports a finding that by allowing his bridle to drag (which his own evidence shows was capable of being prevented), Appellant took some action which a reasonably prudent person of the same station, under the same circumstances ought not to have done or failed to take action which he ought to have done. Of course, this standard is the one which is applicable to these proceedings. 46 C.F.R. 5.05-20 (a) (2).

With respect to Appellant's claim that the sanction imposed was unduly harsh considering Appellant's record and "all that he had suffered by having to attend the hearing," the sanction was not unduly harsh. The severity of an order is a matter peculiarly within the discretion of the Administrative Law Judge and will be modified on appeal only upon a clear showing that it was arbitrary and capricious. No such showing has been made here.

CONCLUSION

Appellant's license was within the jurisdiction of the Coast Guard and these proceedings. There is substantial evidence of a reliable and probative character to support the findings herein.

ORDER

The order of the Administrative Law Judge dated at Seattle, Washington on 6 May 1977, is AFFIRMED.

J. B. HAYES
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D.C., this 14th day of June 1978.

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NEGLIGENCE

Finding justified where towing vessel operator allows
towing bridle to go slack and drag bottom

ORDER

Severity, within discretion of Administrative Law Judge